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No. 06-767

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In the
Supreme Court of the United States

OBERWEIS DAIRY,

Petitioner,

v.

JANE DOE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent Jane Doe was hired part-time by Petitioner Oberweis Dairy in December 2001, just a few months after her sixteenth birthday. It was her first job. Jane Doe was described by co-workers as "nice," "shy," "not very outgoing," "very quiet," and "reserved." During Doe's eight months with Oberweis, she was sexually harassed and sexually assaulted by her 25-year-old manager, James Matthew Nayman. Doe testified that she found her boss's attention inappropriate: "I just didn't feel like it was something that was appropriate for work, but it being my first job. I don't- I don't- I was afraid to say stop. I didn't want to cause a problem [on] my first job."

Doe's mother first became aware of the on-the-job sexual pressures when she learned that her daughter was at Nayman's apartment with other Oberweis managers and employees. She told her daughter to immediately come home, and when she questioned her daughter at home, Doe told her mother that while she was at the workplace, Nayman had kissed her, patted her on her buttocks, put his arm around her, and said things like "oh, if you were only a little older", "if you weren't 16," and that he would love "to go out with her." Not surprisingly, Jane Doe's mother became alarmed and went directly to Doe's workplace to lodge a complaint against Nayman. The manager on duty when the mother complained admitted to Doe's mother that Nayman made several passes at her, even while she was pregnant, that he had touched other employees in a similar manner, and that Nayman had seduced several of the employees, including a young girl under eighteen. The manager made notes of the mother's complaint and assured the mother that she would bring the complaint to the attention of the store manager.

A few weeks later, Doe's mother learned that Nayman had purchased alcohol for a party thrown by her daughter and her high school friends. Doe's mother went to the police to swear out a warrant against Nayman, and, in the course of the police investigation, Doe's mother first learned that Nayman had had sexual intercourse with her daughter approximately one week earlier. Doe had gone to Nayman's apartment with another teenage employee, and when that employee had to leave, Doe gave her a ride home. Nayman asked Doe to come back to his apartment after she took the other employee home. Doe, who was expecting to spend the night at a girlfriend's house, was unable to contact her friend, and went back to her manager Nayman's apartment. Nayman, who was known to come to work drunk or high on drugs, was drinking heavily. He provided an alcoholic drink to Doe, and tried to get Doe into his bedroom. Doe stopped him, told him she "wasn't like that" and went to sit on the couch. Nayman later "grabbed" her hands and took her into the bedroom where they had sexual intercourse. This was Doe's first sexual experience. Doe testified she was "afraid to leave" and "didn't know what else [she] should do." Doe pressed charges against Nayman, who pled guilty to aggravated criminal sexual abuse, was imprisoned, and is now a registered sex offender.

Because of Doe's youth, the severity of the harassment alleged, and the potential for further psychological trauma, one of Doe's attorneys filed the EEOC charge as Doe's agent. Plaintiff was referred to as "Jane Doe" to protect her identity, although in a separate letter to the EEOC the true identity of Jane Doe was disclosed to the EEOC in confidence. Attorneys for Doe at all times cooperated fully with the EEOC and provided extensive information, which allowed the EEOC to conduct an in-depth investigation of Doe's charge. The full copy of the EEOC file shows that the EEOC interviewed more than ten witnesses, many of whose names

had been provided by Doe's agent and most of whom corroborated Doe's description of the sexually hostile environment caused by manager Nayman. Witnesses discussed the "sexually charged" atmosphere at the workplace which allowed Nayman, who was described by one EEOC witness as "a touchy person," to do such things as "grope," "kiss," "grab butts," "hug," give "tittie twisters," and put his arm around "the neck" or "waist" of the female Oberweis employees.[1]

Witnesses before the EEOC also explained that Nayman was having sex with at least two of the employees (one of whom was 17 years of age) before he preyed upon Doe; and that Nayman often invited other managers, including the assistant store manager, and the teenage employees to parties at his apartment and served them alcohol. Unfortunately, when the EEOC conducted its interviews, it failed to keep Doe's identity confidential and many of her high school classmates (who also worked at the ice cream shop) learned the sordid details. Doe was humiliated and traumatized by her classmates' knowledge of the facts, and when the EEOC asked to interview Doe, her counsel advised her to decline the interview. This was based on a determination by Doe's mother and Doe's psychotherapist that questioning by EEOC would cause Doe further trauma. Jane Doe's attorneys made clear to the EEOC that they remained willing to provide any and all information requested by Doe. Jane Doe, through her agent, cooperated in good faith with the investigation and did not prevent the investigator from obtaining any evidence. Even Oberweis never argued that Jane Doe acted in bad faith.

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[1] The record demonstrates that these actions were taken in the presence of the other managers, including the store manager, who was also aware of Nayman's harassment of other employees.

REASONS FOR DENYING THE PETITION

1. The Tenth and Seventh Circuits do not conflict on the question of whether a good faith Title VII Plaintiff, who has supplied factual information and witness names, may be found to have failed to cooperate with the EEOC such that she cannot proceed with her own Title VII claim in federal court.

Despite Oberweis' contrary claim, the Tenth and Seventh Circuits do not conflict on the facts of this case. The Tenth Circuit addressed a duty to cooperate before filing an ADEA claim (not a Title VII claim), and as both courts noted, there may be differences between the statutes that would affect the outcome of the question presented. *Doe v. Oberweis Dairy*, 456 F.3d 704, 709 (7th Cir., 2006); *Shikles v. Sprint/United Management Co.*, 426 F.3d 1304, 1308 (10th Cir. 2005). Even apart from that distinction, there is no conflict between the two decisions. Although the two circuits disagree on whether there is a cooperation element included in "the statutory scheme," the Tenth Circuit did not find that the EEOC's issuance of a right-to-sue letter on the basis that a complainant failed to cooperate was dispositive. Instead, the Tenth Circuit set out a case-by-case test for when a plaintiff has failed to cooperate and reviewed the record to determine whether the ADEA plaintiff had not cooperated *in good faith* with the EEOC. *Shikles,* 426 F.3d at 1311-12 ("Perfect cooperation with the EEOC is not required. Rather, a claimant must merely cooperate as part of a good faith attempt to allow the EEOC a reasonable opportunity to reach the merits of his or her charge.")[2]

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[2] In contrast to Doe's extensive, good faith cooperation, the Tenth Circuit noted that Shikles "never provided the investigator with *any* information on his claim of discrimination beyond that contained in

Although the Seventh Circuit disagreed with the Tenth Circuit's ultimate decision to graft a cooperation requirement on to Title VII (where none explicitly exists), that disagreement would not affect Doe's case because Doe did cooperate and her failure to submit to an interview was not in "bad faith." Put otherwise, she acted in good faith within the meaning of the Tenth Circuit's test, and, thus, her case would go forward in either circuit. The EEOC's request for an interview was the only request turned down by Doe. Doe was only 17 when the charge was filed, and, as explained above, the interview was refused on the advice of Doe's attorney, her mother, and her therapist that an interview would be too traumatizing. Doe cooperated extensively through her attorney by supplying the Commission with information that enabled the staff to interview more than ten witnesses. Even when turning down the interview request, Doe's attorney offered to furnish the commission with answers to any questions that the staff would have wanted to ask Doe in an interview. Instead, the EEOC did not accept the offer of written questions, dismissed the charge for failing to cooperate, and issued a right to sue letter. The Seventh Circuit held that Doe's failure to submit to an interview was not in "bad faith," as Doe had a good faith reason for not participating in the interview due to the concern about her mental health and well being. *Doe,* 456 F.3d at 711.

Even if the Court were otherwise inclined to resolve the difference in approach to the EEOC cooperation issue taken by the Seventh and Tenth Circuits, the Court's recent

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his initial EEOC charge" and "having been given 30 days in which to respond, failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve his charge." *Shikles*, 426 F.3d at 1307.

decision in *Woodford v. Ngo,* 126 S.Ct. 2378 (2006), which post-dates the Tenth Circuit's ruling in *Shikles*, provides a compelling reason not to do so. In *Woodford,* this Court considered the exhaustion requirements of the Prison Litigation Reform Act of 1995 (PLRA) 110 Stat. 1321-71, as amended. *Id.* at 2382. The purpose of the PLRA was to strengthen the exhaustion provision of the Civil Rights of Institutionalized Persons Act, § 7, 42 U.S.C. § 1997, in several ways, notably by making exhaustion of administrative remedies mandatory, as opposed to discretionary, as had previously been the case. *Id.* Moreover, prisoners must now exhaust all "available" remedies, not just those that meet federal standards, even where the relief sought – such as monetary damages – cannot be granted in the administrative process. *Id.*, at 2382-83. In disputing the prison officials' claim that the prisoner had not exhausted his administrative remedies because his grievance had been rejected as untimely under state law, the prisoner argued that the exhaustion requirement of the PLRA was patterned on 14(b) of the Age Discrimination in Employment Act of 1967 and § 706(e) of Title VII of the Civil Rights Act of 1964. *Id.* at 2389-91. This Court in *Woodford* specifically rejected the comparison to Title VII (and the ADEA) because "[n]either of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision." *Id.* at 2390-91. In short, *Woodford* strongly suggests that between the Tenth and Seventh Circuits, the latter had the better of the argument, and because the Tenth Circuit has not had an opportunity to revisit the issue post-*Woodford*, review at this time would be premature.

In any event, the decision below is correct, as maintained by the EEOC – the federal agency authorized by Congress to process Title VII claims. The District Court's ruling below led the EEOC to file an amicus brief in the Court of Appeals

and to participate in oral argument in support of Jane Doe. The EEOC asked the courts not to judicially craft a cooperation requirement. Contrary to Oberweis' insistence that the EEOC "needed" an interview in order to conduct a meaningful investigation, the EEOC's unequivocal opinion, as outlined in its amicus brief in this case, is that "[i]t is the Commission's position that, regardless of the agency's reason for dismissing a charge, if the charging party has satisfied the express prerequisites to suit, she has the right to sue her employer, based on the charge, and have a court determine the merits of her discrimination claim. That is why the notice of right to sue that Doe received is worded as it is." (Amicus Brief of the Equal Employment Opportunity Commission in Support of Appellant Jane Doe, p. 14.)

The Seventh Circuit's opinion took into account the position of the EEOC in declining to craft a cooperation requirement. As Judge Posner noted below, Doe satisfied all of the procedural requirements imposed by Title VII as a precondition to bringing a suit in federal court:

> Title VII has its own requirements as to what claimants must do before they can sue, but at least so far as the statutory text is concerned, those requirements are limited to 1) filing a charge with the Equal Employment Opportunity Commission within 180 days after the date of the complained-of employment action, in states that do not have an equal employment opportunity agency, and within 300 days in states like Illinois that do, ... and 2) waiting to sue until receiving notification (the 'right to sue letter') from the Commission that the Commission does not intend to sue. *Doe,* 456 F.3d at 708.

Although Oberweis asserts that the EEOC "reasonably determined that the statement of a trained lawyer...was an inadequate substitute for an interview with Doe herself," it is common practice for EEOC respondents to provide their statements and responses solely through an attorney representative, as *Oberweis itself did in this very case*.

Oberweis claims that the EEOC, "without information from Doe[,]...found itself unable to determine whether there was reasonable cause to believe her charge was true;" "cannot meaningfully investigate a charge without information from the charging party;" and "Doe prevented the EEOC from reaching a determination on the merits of her charge." None of these assertions is supported by the record or the amicus brief filed by the EEOC below. As stated above, Doe provided the EEOC with a great deal of information, which led to over ten witness interviews, many of whom discussed the sexually charged atmosphere of Doe's workplace with the investigator, and Doe was willing to respond to any further questions through her representative. Additionally, there is no support in the EEOC regulations or the brief from the EEOC for the idea that the interview of the Complainant is the only possible way for the EEOC to meaningfully investigate a charge. Finally, as the Seventh Circuit noted, "[n]or is there any indication that by failing to sit for an interview she made it more difficult to resolve her dispute with the defendant before bringing suit. The defendant would not have had access to a transcript of the interview unless and until she sued." *Doe,* 456 F.3d at 711.

As the Seventh Circuit also pointed out, both during oral argument and in its opinion, it would be near impossible for the courts to police a requirement of "good faith" cooperation without greatly increasing both the uncertainty of whether a Plaintiff has exhausted her administrative remedies through

the EEOC's investigation process, as well as increasing the burden on the courts in cases stemming from EEOC complaints. What standard is necessary for good faith or bad faith? What reasons would amount to good faith non-cooperation with a request for an interview, if any? Would it be enough for the charging party to appear for an interview, but refuse to answer questions? What if the charging party answered some questions but not others? What about the situation posed by Doe, where the complainant believed she had a reason to refuse submitting personally to an interview, but offered to answer any questions through a representative? Would it be enough that Jane Doe had a good-faith belief that her reason was sufficient to excuse not appearing for an interview, or would the courts later have to adjudicate the question whether there was an objectively sufficient reason? What other circumstances might excuse a failure to cooperate? Would defendants be discouraged from mediating in the EEOC process or in the early stages of litigation if they could make an argument that the plaintiff did not exhaust her remedies? Are defendants similarly held to a standard of good faith, what circumstances would amount to bad faith actions by defendants, and what would the consequences be for a bad faith effort on their part? These are just a small number of the difficult, litigation-spawning questions the courts would face if Oberweis' proposed "good faith cooperation" requirement were adopted.

For all of these reasons, the Court should deny review on the first question presented.

2. The conduct by Doe's manager cannot be deemed welcome under any circumstances, and the Seventh Circuit's opinion is consistent with the jurisprudence in sexual harassment cases.

As an initial matter, it is important to note that there also exists no split among the circuits on the second and third issues presented, and Oberweis does not contend otherwise. Doe presented facts demonstrating that her manager's conduct was not welcome. Doe also argued that the question of welcomeness could not be raised as a defense based both on her youth and because intercourse between the 25-year-old manager and the 16-year-old employee was a crime that resulted in the manager being convicted, sent to prison, and listed as a registered sex offender. The Seventh Circuit correctly determined that the 16-year-old plaintiff could not, as a matter of law, have welcomed her manager's conduct.[3] The Seventh Circuit simply drew a bright line for when the age factor would be dispositive on the issue of welcomeness.

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[3] The federal courts of appeals have often cited to an employee's minority status as a material fact in Title VII sex harassment cases. *See, e.g., Loughman v. Malnati Organization Inc.*, 395 F.3d 404, 405-06 (7th Cir. 2005) (summary judgment reversed; noting that Plaintiff was seventeen years old at the time of the harassment); *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1248 (11th Cir. 2004) (summary judgment reversed; noting that employee was a teenager and supervisor was not); *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27, 37 (1st Cir. 2003) (summary judgment reversed; employee "was a seventeen year old who had just been assaulted by a supervisor twice her age"); *EEOC v. R&R Ventures*, 244 F.3d 334 (4th Cir. 2001) (summary judgment reversed; alleged harasser "was an adult male in a supervisory position over young women barely half his age"); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 140 (4th Cir. 1996) (employee who was allegedly the subject of sexual advances was sixteen years old).

Oberweis' argument that a bright line standard would create confusion because the age of consent differs somewhat from state to state is mistaken. Though the age of consent may differ, the conduct that renders a defendant culpable under state law does not. The issue of consent is always one that has been left to the state, and Judge Posner's decision appropriately deferred to state law on that question, thereby rejecting Oberweis' contrary view, which would undermine the states' ability to use the criminal law to protect minors within their jurisdictions. The Seventh Circuit's ruling does not undermine national uniformity; under it, Title VII simply follows the age of consent of the state where an employer is located, and the employer is charged with knowing and complying with the criminal laws of a state in which it does business.[4]

3. The Question of Doe's subjective views is also not worthy of this Court's review

Oberweis' attempts to obtain review on the issue of welcomeness by portraying the district court's incorrect presentation of the facts as uncontested should not sway this Court. Even if this Court were to decide that a 16-year-old victim *could,* as a matter of law, have welcomed her manager's sexually harassing conduct and sexual assault, the record clearly shows, as the Seventh Circuit found, that the district court "stepped out of the proper role of a judge" when it made findings concluding that Doe "welcomed" the conduct

[4] Oberweis' statement that the result here would have been different had Doe been 17 prior to the sexual assault is nonsensical because the conduct at issue here constituted sexual harassment under Title VII regardless of the statutory rape. In any event, Oberweis misunderstands Illinois law, which protects victims under the age of 18. The fact that Doe was 16 made the offense aggravated, but it still would have been a crime even if Doe had been 17.

and entered summary judgment in favor of Oberweis. *Doe,* 456 F.3d at 713. As Judge Posner explained:

> Nayman, the shift supervisor, regularly hit on the girls (most of the employees were teenaged girls) and young women employed in the ice cream parlor. He would, as one witness explained, "grope" "kiss" "grab butts," "hug" and give "tittie twisters" to these employees, including the Plaintiff. These things he did in the store, but he would also invite the girls to his apartment. He had sexual intercourse in the apartment with two of them, one of them a minor, before it was the Plaintiff's turn. He was 25 when he had intercourse with her....

Doe, 456 F.3d at 712-13.

Given the facts, Doe adequately demonstrated that Nayman's conduct was not welcome. The fact that Doe acquiesced to sexual intercourse with a manager nine years her senior on that one occasion cannot be deemed sufficient to categorize the conduct as "welcome." In *Meritor,* this Court specifically addressed the issue of volition in its discussion of unwelcomeness:

> While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual

advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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